LEONG SENG KIAT

v.

LAW PENG GUAN & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 22-582-1978]
23 SEPTEMBER 1991

CIVIL PROCEDURE: *Want of prosecution - Application to strike out plaintiff's action - Circumstances in which an action may be dismissed for want of prosecution - Delay in setting down case for trial - Inordinate and inexcusable delay RHC 1980 O. 25 r. 1(1), 1(4).*

This is the third defendant's application for an order to dismiss the plaintiff's action in this suit on the ground of want of prosecution.

This action was originally brought by the plaintiff against the first and second defendants and issued by this Court on 20 December 1978. When the writ and the statement of claim were served on the defendants by substituted service on 24 April 1979, both defendants failed to enter appearance. Then on 20 July 1979 the plaintiff obtained judgment in default of appearance against them. By summons-in-chambers dated 25 October 1986 the intervener/third defendant applied for leave to intervene in the action and to set aside the judgment in default of appearance dated 20 July 1979. On 6 April 1987, the learned Judge granted an order in terms of the intervener's application and also directed that the intervener be henceforth named as the third defendant in the action.

On 25 August 1987, the plaintiff appealed against the Court's decision to the Supreme Court, which was dismissed on 14 May 1988. *Inter alia,* the Supreme Court ordered that the third defendant/intervener shall file his pleadings and serve it on the other parties within 14 days from the date of the said order.

On 27 May 1988 the third defendant served his defence on the plaintiff. Thereafter the solicitors for the plaintiff did nothing towards having the case set down for trial until 5 February 1991 when the solicitors filed the summons for directions under O. 25.

The learned Judge observed that the summons was taken out after the third defendant's solicitors filed the present application on 14 November 1990. It was also noted that, under O. 25 r. 1(1) the plaintiff must, within one month after the pleadings are deemed to be closed, take out a summons in Form 46 returnable in not less than 14 days.

Held:

[1] The Court was satisfied, firstly, the plaintiff has been guilty of inordinate and inexcusable delay in taking out the summons for directions to prosecute his action against the third defendant. A period of 2 years and 3 months is materially a longer time than usual to apply for summons for directions after the pleadings are deemed to be closed. Hence the delay is inordinate.

[2] The non-prosecution of the case after a period of 2 years 8 months in the context of the present case, has gravely prejudiced the third defendant in the actual conduct of the trial. He is today 76 years old and the only material witness in his own case. In my opinion, the delay would have grave effect on his memory and by reason thereof would be substantial risk that a fair trial would not be possible which in turn would affect the defendant's case.

[Order that the plaintiff's action against the third defendant be struck out.]

Case referred to:
Birkett v. James [1977] AC 297; [1977] 3 WLR 38; [1977] 2 All ER 801 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 25 rr. 1(1), (4)

Other source referred to:
Supreme Court Practice 1991 Vol. 1 under 25/1/5 460

For the plaintiff - Darshan Singh Khaira; M/s. Darshan Singh & Co.
For the defendant - Louis Van Buerle; M/s. Cheong Wai Meng & Van Buerle

JUDGMENT

Mohamed Dzaiddin J:

This is the 3rd defendant's application for an order to dismiss the plaintiff's action in this suit on the ground of want of prosecution.

The facts giving rise to this application are as follows. This action was originally brought by the plaintiff against the 1st and 2nd defendants and issued by this Court on 20 December l978. When the writ and the statement of claim were served on the defendants by substituted service on 24 April 1979, both defendants failed to enter appearance. Then on 20 July l979 the plaintiff obtained judgment in default of appearance against them. By summons-in-chambers dated 25 October 1986 the intervener/3rd defendant applied for leave to intervene in the action and to set aside the judgment in default of appearance dated 20 July 1979. On 6 April 1987, I granted an order in terms of the intervener's application and also directed that the intervener be henceforth named as the 3rd defendant in the action. On 25 August 1987, the plaintiff appealed against my decision to the Supreme Court, which said appeal was dismissed on 14 May 1988. The Supreme Court, however, ordered, *inter alia*, "that the intervener shall file his pleadings and serve it on the other parties within 14 days from the date hereof". On 27 May 1988 the 3rd defendant served his defence on the plaintiff. Thereafter, the solicitors for the plaintiff did nothing towards having the case set down for trial until 5 February 1991 when the solicitors filed the summons for directions under O. 25. It is interesting to note that this summons was taken out after the 3rd defendant's solicitors filed the present application on 14 November 1990.

Thus, based on the above facts there was a delay of 2 years 8 months on the part of the plaintiff to prosecute the action which is calculated from the time he was served with the defence until the filing of the summons for direction. It should be noted here that under O. 25 r. 1(1) the plaintiff must, within one month after the pleadings are deemed to be closed, take out a summons in Form 46 returnable in not less than 14 days.

In support of this application the 3rd defendant affirmed an affidavit on 13 November 1990 (encl. A 43) verifying that since the service of the defence on the plaintiff on 27 May 1988, the plaintiff or his solicitors had taken no further steps to have the case set down for trial until after his solicitors filed the present application to strike out the action. He stated that he was 76 years old and that he and his family had been in occupation of the said property for more than 13 years. He verily believed that because of the plaintiff's lack of interest in the action, he would be prejudiced as he would be the only person who knew the full facts of the case. He further deposed that should anything happen to him, his family would not have any witness to testify in support of the defence unless the action was heard expeditiously.

In response to the 3rd defendant's application, the plaintiff affirmed an affidavit on 13 March 1991 (encl. 45) whereby he denied that there was any inordinate delay. He blamed the 3rd defendant for failing to file the pleadings and to serve it on him and also for failing to give one-month notice of his intention to proceed. Further, he claimed that there was a pending application for summary judgment.

The Law

According to the *Supreme Court Practice 1991* Vol. 1 under 25/1/5 p. 460, there are two distinct, though related, circumstances in which an action may be dismissed for want of prosecution, namely:

(a) when a party has been guilty of intentional and contumelious default, and

(b) where there has been inordinate and inexcusable delay in the prosecution of the action.

Here we are concerned with (b) that is inordinate and inexcusable delay. Under 25/1/6 it is stated that the requirements are:

a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and

b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

This statement of the law was approved by the House of Lords in *Birkett v. James* [1977] AC 297 at 318; [1977] 3 WLR 38, [1977] 2 All ER 801, HL. But what is "serious prejudice" depends on the facts.

"Inordinate" means "materially longer than the time usually regarded by the profession and Courts as an acceptable period" (*Birkett v. James* above).

> For "inexcusable delay", this ought to be looked at primarily from the defendant's point of view or, at least, objectively; some reasonable allowance for illness and accidents may, be made. But the best excuse is usually the agreement of the defendant or difficulties created by him.
>
> On the question of "prejudice to the defendant", this is a matter of fact and degree and has been discussed in *Allen v. McAlpine* [1968] 2 QB 2 229 and in a large number of reported cases. The effect of the lapse of time on the memory of witnesses or in the course of such time of their death or disappearance are the most usual factors. Their importance depends on the circumstances, the issues and the other evidence that can be given. ... But prejudice is not limited to matters affecting proof; a defendant, particularly a professional man, may be made prejudiced by having an action hanging over his head indefinitely (*Biss v. Lambeth, Southwark and Levisham Health Authority (Teaching)* [1978) 1 WLR 382.)

Conclusion

After considering the circumstances of the case and the law, I am satisfied, firstly, the plaintiff has been guilty of inordinate and inexcusable delay in taking out the summons-for-directions to prosecute his action against the 3rd defendant. A period of 2 years and 8 months is materially a longer time than usual to apply for summons for directions after the pleadings are deemed to be closed. Hence, the delay is inordinate. As for inexcusable delay, the plaintiff's affidavit does not seem to offer any reasonable or credible explanation for his solicitor's delay in proceeding with the action, aside from putting the blame on the 3rd

defendant's solicitors. I am aware that under r. 1(4), if the plaintiff does not take out the summons-for-directions the defendant may either do so himself or apply for an order to dismiss the action. In my opinion it is not incumbent on the 3rd defendant's solicitors to take out the summons. He may choose one or the other. The fact remains that after being served with the defence, the plaintiff's solicitors did not take out the summons for direction until after 2 years 8 months when they suddenly became aware of the 3rd defendant's application to strike out the action.

Secondly, the non-prosecution of the case after a period of 2 years 8 months in the context of the present case, has gravely prejudiced the 3rd defendant in the actual conduct of the trial. He is today 76 years old and the only material witness in his own case. In my opinion, the delay would have grave effect on his memory and by reason thereof there would be substantial risk that a fair trial would not be possible which in turn would affect the defendant's case.

For the above reasons, I grant this application and make an order that the plaintiff's action against the 3rd defendant be struck out for want of prosecution.

Costs of the application shall go to the 3rd defendant to be fixed by the Registrar.

Also found at [1992] 2 CLJ 825